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IN THE

# Supreme Court of the United States

**October Term, 1971**

**No. 71-781**

In the Matter of An Arbitration

*between*

COOK INDUSTRIES, INC., as Assignee of RAG. LUIGI GANDINI VOGHERA,

*Petitioner,*

*and*

C. ITOH & CO. (AMERICA) INC.,

*Respondent.*

## OPPOSING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID A. BOTWINIK
*Attorney for Respondent*
63 Wall Street
New York, New York 10005

PAVIA & HARCOURT
*of Counsel*

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### Questions Presented

1. Does *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968) require the vacation of an arbitration award if one of the arbitrators does not disclose on the record ordinary business dealings with one party when the other party to the arbitration had prior knowledge of those dealings and did not raise an objection?

2. If *Commonwealth Coatings, supra,* does not require dismissal, should this Court grant certiorari to review a

factual determination that there were no extraordinary dealings which were required to be revealed by the arbitrator?

## Statement

Petitioner, the unsuccessful party in an arbitration before the Arbitration Committee of the New York Produce Exchange, brought the proceeding below in an attempt to set aside the award on the ground that Robert R. Anderson, one of the four members of the arbitration committee who heard the case, failed to reveal that his employer (Cargill, Inc.) had substantial business dealings with respondent.

During the course of the arbitration, neither party felt it necessary to question the arbitrators about possible dealings with the parties, and the arbitrators did not feel it necessary to reveal such dealings (34a). Both parties knew that such dealings existed. Robert Anderson especially was known to both parties (34a). His employer, Cargill, Inc., is the largest United States company in the grain trade, and has had dealings with both respondent and petitioner. Indeed, petitioner's grain department was largely made up of Cargill alumni. John Finlayson, who was present throughout the arbitration hearings, William Adams, who submitted an affidavit in support of the motion, and Philip McCaull who was in charge of the department, previously were employed by Cargill and had full personal knowledge of Cargill's dealings with respondent (34a). The respondent made no secret of its dealings with Cargill since Naohiro Minami, the Manager of respondent's Grain Department, testified that respondent dealt with Cargill (36a).

Cook was aware of the dealings between Cargill and Itoh, not only through Cargill's former employees, but also through the daily exchange of information, which is part and parcel of the commodities business (31a). The small

number of companies actively engaged in the grain business deal with each other continually, and exchange details of purchasers and sales regularly (31a).

Despite the petitioner's admitted prior knowledge of the dealings between Cargill and respondent, petitioner argued that Mr. Anderson's failure to disclose the relationship on the record raised an implication of partiality sufficient to justify vacation of the award under § 10 of the Federal Arbitration Act, 9 U.S.C. 10. Respondent argued that petitioner had full knowledge that respondent did business with Cargill, Inc. and that petitioner's participation in the arbitration without objection constituted a waiver of any claim.

Judge McLean of the United States District Court distinguished this case from Commonwealth Coatings, *supra*. He pointed out that the fact that Mr. Anderson was merely an employee of Cargill, Inc. with no pecuniary interest in its transactions created a situation different from the one presented in Commonwealth Coatings, *supra*, where one of the arbitrators had personally done work for and received fees from a party to the arbitration. Rather than rest his decision on that narrow ground, however, Judge McLean relied on *Garfield & Co.* v. *Weist*, 432 F. 2d 849 (2nd Cir. 1970), Cert. denied 401 U.S. 940 (1971), where the Court said:

> ". . . In this opinion we are only holding that, when parties have agreed to arbitration with full awareness that there will have been certain, almost necessary, dealings between a potential arbitrator and one of the opposing parties, disclosure of these dealings is not required by *Commonwealth Coatings* inasmuch as the parties are deemed to have waived any objections based on these dealings."

On appeal, the petitioner repeated its *Commonwealth Coatings*-related arguments and attempted to fit itself into an exception stated by the Court of Appeals in the *Garfield*

case by arguing that there were transactions out of the ordinary course of business of which petitioner was unaware.

The Court of Appeals affirmed Judge McLean's decision. The majority of the Court found *Commonwealth Coatings* readily distinguishable since in that case the facts relating to the business relationship were unknown to the petitioner, while in this case: "The district court was justified in concluding that appellant was fully aware at the time of the submission to arbitration of the relationship between appellee and Cargill."

The majority also found that there was nothing in the record to support petitioner's claim of extraordinary dealings between respondent and Cargill.

The dissenting judge did not quarrel with the legal conclusion of the majority. His disagreement was based on his opinion that the affidavits had raised questions of fact which should be resolved by a hearing.

## POINT I

**The decision below is not in conflict with the decision of this Court in the *Commonwealth Coatings* case, *supra*.**

The petitioner argues on pages 5 and 6 of the petition, that the *Commonwealth Coatings* case creates an absolute duty on the part of an arbitrator to disclose his relationship with a party to the arbitration regardless of knowledge of the relationship by the other party, and that the decision of the Court below conflicts with *Commonwealth* because the Court of Appeals held that formal disclosure was unnecessary where there was prior knowledge.

While respondent believes that the word "disclosure" is broad enough to encompass prior knowledge, there is no need to rely on a definition of the word. The decision in

*Commonwealth, supra*, makes it clear that this Court intended only to condemn participation by an arbitrator whose relationship with one of the parties was unknown to the other party. The decision rested on the underlying statement that:

> "... the facts concerning the close business connections between the third arbitrator and the prime contractor were unknown to petitioner and were never revealed to it by [the] arbitrator, by the prime contractor, or by anyone else until after an an award had been made." 393 U.S. at 146.

In addition, this Court, in analogizing the situation to one involving a judge or foreman of a jury, stated:

> "We have no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had, *unknown to the litigant*, any such relationship, the judgment would be subject to challenge." (emphasis supplied) 393 U.S. at 148.

The Court of Appeals correctly interpreted *Commonwealth Coatings*. A holding that that case required arbitrators to spread on the record information known to both sides would have been a misinterpretation of the purpose and intent of this Court.

## POINT II

### I.

**The difference of opinion between the majority and the minority in the Court below as to whether the affidavits raised a question of fact which should be resolved by a hearing is not a reason for granting certiorari.**

Since, as has been demonstrated in Point I, *Commonwealth Coatings, supra*, requires disclosure on the record only if the facts of a relationship between a party and an arbitrator are unknown to the other party, and since the

business relationship between respondent and Cargill was known to petitioner, the only question raised in the successive appeals from the award concerned the alleged extraordinary dealings between respondent and Cargill which were unknown to the petitioner.

The majority of the Court below held that the petitioner had "the burden of showing any such extraordinary dealings and failed to do so." The dissenting judge argued that the affidavits had raised sufficient questions to warrant a hearing.

On the basis of the record before the Court, the majority's conclusion was clearly correct. The petitioner's affidavits contain no claim or proof of any extraordinary dealings between Cargill and respondent.

Even if the majority had erred, however, such error would provide no reason for granting certiorari. There is no special or important reason for this Court to review an essential factual determination.

## CONCLUSION

**The present case is not a proper one for review by this Court. The petition for certiorari should therefore be denied.**

Respectfully submitted,

DAVID A. BOTWINIK
*Attorney for Petitioner*

PAVIA & HARCOURT
*of Counsel*